TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 235.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BOB CELESTINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED AUGUST 11, 1909.

(21300)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 504.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BOB CELESTINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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1 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF AND PLAINTIFF in error, *vs.* BOB CELESTINE, DEFENDANT AND DEFENDANT IN ERROR.	No. 1684.

Transcript of record to the Supreme Court of the United States, Washington, D. C., from the Circuit Court of the United States for the Western District of Washington, Northern Division.

2 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF AND PLAINTIFF in error, *vs.* BOB CELESTINE, DEFENDANT AND DEFENDANT IN ERROR.	No. 1684.

Counsel: Elmer Ely Todd, esquire, Lowman Building, Seattle, Washington, United States district attorney. Frank B. Wiestling, esquire, 422 Boston Block, Seattle, Washington, attorney for defendant and defendant in error.

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4 In the United States Circuit Court for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, *Western District of Washington, ss:*

UNITED STATES OF AMERICA, plaintiff, *vs.* BOB CELESTINE, defendant.	Indictment. Act of March 3, 1885, sect. 9, 23 Stat. Large, 385; sec. 5339, R. S.

May Term, A. D. 1908.

Count I. The grand jurors of the United States, duly empaneled, sworn, and charged to inquire within and for said Western District of Washington, Northern Division, upon their oaths present:

That one Bob Celestine, an Indian, on the 30th day of August, in the year of our Lord one thousand nine hundred and six, within the limits of the Tulalip Indian Reservation, within the boundaries of the State of Washington, and within said Western District of Washington, Northern Division, did, with force and arms, make an assault upon one Mary Chealco, an Indian woman, with an axe, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, wilfully, knowingly, and with malice aforethought strike, beat, and mortally wound said Mary Chealco with said axe upon the head of the said Mary Chealco, with intent to kill
5 and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said Tulalip Indian Reservation, in said Western District of Washington. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Bob Celestine, her, the said Mary Chealco, in the manner and at the time aforesaid, did feloniously, wilfully, and with malice aforethought kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count II. And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That one Bob Celestine, on the 30th day of August, in the year of our Lord one thousand nine hundred and six, in the Western District of Washington, within the Tulalip Indian Reservation, a place under the exclusive jurisdiction of the United States, did, with force and arms, make an assault upon one Mary Chealco, with an axe, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, wilfully, knowingly, and with malice aforethought strike, beat, and mortally wound said Mary Chealco with said axe upon the head of the said Mary Chealco, with intent to kill and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said

Tulalip Indian Reservation, in said Western District of Washington.

And so the grand jurors aforesaid, upon their oaths aforesaid,
6 do say that the said Bob Celestine, her, the said Mary Chealco, in the manner and at the time aforesaid, did feloniously, wilfully, and with malice aforethought kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,
United States Attorney.

Witnesses examined before grand jury: Dr. C. E. Munn, William McLean, Charles Hillaire, William Jones, John Lewis, Mary Eliza Wilson, George Jones, Dr. Charles M. Buchanan.

(Indorsed:) No. 1684. United States Circuit Court, Northern Division, Western District of Washington. The United States vs. Bob Celestine. Indictment for violation of act of March 3, 1885, sec. 9, 23 St. Large, 385; sect. 5339, R. S. A true bill: Bew W. Barnes, foreman grand jury. Filed May 22, 1908. A. Reeves Ayres, clerk, by R. M. Hopkins. Elmer E. Todd, U. S. attorney. Presented to the court by the foreman of the grand jury in open court, in the presence of the grand jury, and filed in the U. S. Circuit Court May 22, 1908. A. Reeves Ayres, clerk: A. N. Moore, deputy.

7 United States Circuit Court for the Western District of Washington.

UNITED STATES OF AMERICA *vs.* BOB CELESTINE.	No. 1684. Praecipe.

To the clerk of the above-entitled court:

You will please issue certified copy of indictment in above cause.

ELMER E. TODD,
U. S. Attorney.

(Endorsed:) Praecipe for process, etc. Filed in the U. S. Circuit Court, Western Dist. of Washington, May 22, 1908. A. Reeves Ayres, clerk; A. N. Moore, dep.

8 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA *vs.* BOB CELESTINE.	No. 1684.

UNITED STATES OF AMERICA, *Western District of Washington, Office of United States Marshal, ss:*

I, C. B. Hopkins, marshal of the United States for the Western District of Washington, do hereby certify that on the 26th day of May, 1908, at the county jail of King County, in the city of Seattle,

and district aforesaid, I served a copy of the original indictment returned in the above-entitled cause, on the above-named defendant, by then and there delivering to and leaving with Bob Celestine, the ——— defendant above named, a full, true, and correct *of* copy of said indictment, duly certified under seal, by the clerk of the above-entitled court.

In witness whereof, I have hereunto set my hand at Seattle, in said district, this 2nd day of June, 1908.

C. H. HOPKINS,
United States Marshal for the Western District of Washington,
By FRED M. LATHE,
Deputy Marshal.

(Indorsed:) Marshal's return. Filed in the U. S. Circuit Court, Western Dist. of Washington, June 2, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, deputy.

9 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA *vs.* BOB CELESTINE.	No. 1684. Arraignment.

Now on this 2nd day of June, 1908, into open court, comes the defendant Bob Celestine, accompanied by his counsel, Frank B. Wiestling, esquire, for arraignment, and being asked by the court if the name by which he is indicted is his true name, he replies: "It is." Whereupon the indictment is read to him, and a duly certified copy of the indictment is served upon him.

Entered in Vol. 1 at page 202, U. S. Circuit Court Journal.

10 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BOB CELESTINE, DEFENDANT.	No. 1684. Special plea to the jurisdiction.

This, the special plea of the defendant, Bob Celestine, to the indictment herein against him, and both counts thereof, and to the jurisdiction thereof as to his person and the subject-matter therein contained, shows as follows:

I.

That at a time long prior to the date of the alleged offence mentioned in the said indictment, this defendant had allotted to him as the head of a family by the United States Government certain land situate on the Tulalip Indian Reservation, within the limits of the

State of Washington, and described as SW. quarter of section 17, township 30 north, range 5 east W. M., containing 160 acres, under the provisions of the treaty of January 22, 1855 (12 Stat. at Large, 921), and in accordance with Executive order of December 23, 1873, and a United States Government patent was issued to and delivered to this defendant therefor on May 19th, 1885, the said defendant being at that time a member of the Tulalip tribe of Indians within the State of Washington (then Territory) and a true and correct copy of the said patent is annexed hereunto and made a part of this plea, and this defendant is the same person who is named as allottee therein, and ever since the said date this defendant has been and still is a citizen of the United States, and therefore subject to the laws of the Territory and State of Washington ever since, and
11 ever since the said date the defendant has resided within the said Territory and State, and this defendant was born within the territorial limits of the United States and has always resided within such limits, and therefore this defendant is now entitled to and has been entitled to for a long time since to all the rights, privileges and immunities of said citizens of the United States, and therefore this honorable court is without jurisdiction of the person of this defendant and of the subject-matter contained in the said indictment, and over the offence therein claimed to have been committed, and this defendant does hereby most respectfully challenge the said jurisdiction of this honorable court for the foregoing reasons and upon the above-stated grounds, and

Therefore does hereby pray that this plea be allowed and that he be discharged from custody and other proper relief in the premises.

Respectfully submitted.

BOB (his x mark) CELESTINE,
Defendant.

F. B. WIESTLING,
Attorney for the Defendant.

Exhibit A attached hereto is a copy of the said patent.

12 EXHIBIT A.

The United States of America, to all to whom these presents shall come, greeting:

Whereas by the seventh article of the treaty concluded on the twenty-second day of January, anno Domini one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Dwamish, Suquamish, Sktahlmish, Samahmish, Smalhkahmish, Skopeahmish, Stkahmish, Snoqualmoo, Skaiwhamish, N'Quentlmamish, Sktahlejum, Stoluckwhamish, Snohomish, Skagit, Kikiallus, Swinamish, Squinamish, Sahkumehu, Noowhaha, Nookwachahmish, Meeseequaguilch, Chobahahbish, and other allied and subordinate tribes and bands of Indians, it is provided that the President, "at his discretion, cause the whole or any portion of the lands hereby reserved,

or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable;"

And whereas there has been deposited in the General Land Office of the United States an order bearing date February 4th, 1885, from the Secretary of the Interior, accompanied by a return dated February 3, 1885, from the Office of Indian Affairs, with a list approved January 23, 1885, by the President of the United States showing the names of members of the Tulalip band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tract of land has been designated as the selection of Bob Celestine, the head of a family consisting of himself, Julia, and Baby, viz, the southwest quarter of section
13 seventeen, in township thirty north, of range five east, of the Willamette meridian, Washington Territory, containing one hundred and sixty acres:

Now know ye, that the United States of America, in consideration of the premises, and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant unto the said Bob Celestine, as the head of the family aforesaid, and to his heirs, the tract of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tract "shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall remain in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions," and "no State legislature shall remove the restrictions"—"without the consent of Congress."

To have and to hold the said tract of land with the appurtenances unto the said Bob Celestine as the head of the family aforesaid and to his heirs forever, with the stipulation aforesaid.

In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this first day of April, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundredth and ninth.

By the President:

[SEAL.]

GROVER CLEVELAND,
By M. McKEAN, *Secretary.*

Recorded vol. 1, p. 151.
S. W. CLARK,
Recorder of the General Land Office.

14 (Indorsed:) Special plea. Filed in the U. S. Circuit Court, Western District of Washington, June 2, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, deputy.

15 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BOB CELESTINE, DEFENDANT.	No. 1684.

Demurrer to plea to the jurisdiction.

Comes now Elmer E. Todd, United States attorney for the Western District of Washington, who prosecutes in behalf of the said United States, and as to the said plea of the said Bob Celestine, by him pleaded herein to the jurisdiction of the above-mentioned court, says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the United States from prosecuting the said indictment, and each of the two counts thereof against the said Bob Celestine, and that the said United States are not bound by the law of the land to answer the same, and this, the said Elmer E. Todd, who prosecutes as aforesaid, is ready to verify; wherefore, for want of sufficient plea in this behalf, said Elmer E. Todd, for the United States, prays judgment, and that the said Bob Celestine may be convicted of the premises of the said indictment specified.

ELMER E. TODD,
United States Attorney.

(Indorsed:) Demurrer to plea to the jurisdiction. Filed June 2, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, deputy.

16 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA *vs.* BOB CELESTINE.	No. 1684. Order allowing defendant to amend special plea.

Now, on this 2nd day of June, 1908, upon motion of defendant, it is ordered that leave be and is hereby granted defendant to amend the special pleas to the jurisdiction filed in this cause.

Entered in vol. 1, page 202, U. S. Circuit Court journal.

17 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BOB CELESTINE, DEFENDANT.	No. 1684. Amended special plea to the jurisdiction.

This, the amended special plea of the defendant Bob Celestine, to the indictment herein against him, and both counts thereof, and to

the jurisdiction thereof as to his person and the subject matter therein contained, shows as follows:

I.

That at a time long prior to the date of the alleged offence mentioned in the said indictment, this defendant had allotted to himself as the head of a family by the United States Government certain land situate on the Tulalip Indian Reservation, within the limits of the State of Washington (then Territory of Washington) and described as the S. W. quarter of section 17, township 30 north, range 5 east W. M., containing 160 acres, under the provisions of the treaty of January 22, 1855 (12 Stat. at Large, page 921), and in accordance with Executive order of December 23, 1873, and a United States Government patent was issued to and delivered to this defendant therefor on May 19, 1885, the said defendant being at that time a member of the Tulalip tribe of Indians within the Territory (now State) of Washington, and a true and correct copy of the said patent is annexed hereunto, marked Exhibit A, and made a part of this plea, and this defendant is the same person who is named as the allottee therein, and ever since the said date this defendant has been and still is a citizen of the United States and therefore ever since subject to the laws of the Territory and State of Washington, and ever
18 since the said date this defendant has resided within the said Territory and State of Washington, and this defendant was born within the territorial limits of the United States and has always resided within such limits, and therefore this defendant is now entitled to and has been entitled to for a long time since to all the rights, privileges and immunities of said citizens of the United States, and the Mary Chealco mentioned in the said indictment was at the time of the alleged offence also a citizen of the United States, and likewise then and there entitled to all the rights, privileges and immunities of such citizens, by virtue of the fact that at a time long prior to the alleged offence she was the wife of and a member of the family of one Chealco Peter who like this defendant became an allottee of the United States of certain land likewise situate within the limits of the said Tulalip Indian Reservation within the territorial limits of the United States, the then Territory, now State of Washington, and the said Mary Chealco became the widow of the said Chealco Peter prior to the said date, and became entitled to the possession of and the ownership of the said land which had previously been allotted to her said husband and his said family of which she was then and there a member, the said Mary Chealco having been born within the territorial limits of the United States and always resided within such limits, and her said husband received a patent to himself and said family as a member of the said tribe of Tulalip Indians at about the same time that this defendant received his said patent, and in words and tenor like the said Exhibit A, hereto attached, she likewise being a member of said tribe of Indians, and the

place of the commission of the offence alleged in the indictment was upon the very land so allotted to the said Chealco Peter and his said family, so that at the time of the alleged offence the said Mary Chealco was a citizen of the United States and was upon part of the said allotment at the time of the commission of the said offence
19 so alleged, and without the jurisdiction of the United States Circuit Court, and

Therefore this defendant challenges the jurisdiction of this honorable court over his person and the offence alleged to have been committed by him, and hence prays that he may be discharged from custody and this plea sustained.

Respectfully submitted.

BOB (his x mark) CELESTINE,
Defendant.
F. B. WIESTLING,
Attorney for the Defendant.

20 EXHIBIT A.

The United States of America, to all to whom these presents shall come, greeting:

Whereas by the seventh article of the treaty concluded on the twenty-second day of January, anno Domini one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Dwamish, Suquamish, Sktahlmish, Samahmish, Smalhkahmish, Skopeahmish, Stkahmish, Snoqualmoo, Skaiwhamish, N'Quentlmamish, Sktahlejum, Stoluckwhamish, Snohomish, Skagit, Kikiallus, Swinamish, Squinamish, Sahkemuhu, Noowhaha, Nookwachahmish, Meeseequaguilch, Chobahahbish, and other allied and subordinate tribes and bands of Indians, it is provided that the President " at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable: "

And whereas there has been deposited in the General Land Office of the United States an order bearing date February 4th, 1885, from the Secretary of the Interior, accompanied by a return dated February 3, 1885, from the office of Indian Affairs, with a list approved January 23, 1885, by the President of the United States, showing the names of members of the Tulalip band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tract of land has been designated as the selection of Bob Celestine, the head of a family consisting of himself, Julia, and baby, viz, the southwest quarter of section

21 seventeen, in township thirty north, of range five east of the Willamm*m*ette meridian, Waashington Territory, containing one hundred and sixty acres:

Now know ye, that the United States of America, in consideration of the premises, and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, anno Domini one thousand eight hundred and fifty-four, with the O*h*aha Indians, has given and granted and by these presents does give and grant unto the said Bob Celestine as the head of the family aforesaid and to his heirs the tract of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tract "shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, and forfeiture, which conditions shall remain in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions" and "no State legislature shall remove the restrictions"—"without the consent of Congress."

To have and to hold the said tract of land with the appurtenances unto the said Bob Celestine as the head of the family aforesaid and to his heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, this first day of April, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

By the President.

[SEAL.] GROVER CLEVELAND,
By M. MCKEAN, *Secretary.*

22 S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 1, page 151.

(Indorsed:) Amended special plea. Filed in the U. S. Circuit Court, Western District of Washington, June 2, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

23 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BOB CELESTINE, DEFENDANT.	No. 1684.

Demurrer to amended special plea to the jurisdiction.

Comes now the plaintiff, the United States of America, by Elmer E. Todd, United States attorney for the Western District of Washington, who prosecutes on behalf of the said United States, and as to the said amended plea of the said Bob Celestine by him pleaded

herein to the jurisdiction of the above-named court, says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the United States from prosecuting the said indictment against the said Bob Celestine, and that the United States are not bound by the law of the land to answer the same, and this the said Elmer E. Todd, who prosecutes as aforesaid, is ready to verify.

Wherefore for want of sufficient plea in this behalf the United States of America pray judgment and that the said Bob Celes-
24 tine may be convicted of the premises of the said indictment specified.

ELMER E. TODD,
United States Attorney.

(Indorsed:) Demurrer to amended special plea to the jurisdiction. Filed June 2, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, deputy.

25 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
vs.
BOB CELESTINE. } No. 1684.

Order overruling demurrer and sustaining amended special plea.

Now, on this 2nd day of June, 1908, this cause comes on to be heard upon the demurrer of the United States to the amended special plea to the jurisdiction filed by the defendant, Elmer E. Todd, esquire, United States attorney, appearing for and on behalf of the United States, and Frank B. Weistling, esquire, appearing for and on behalf of the defendant; after hearing argument of respective counsel and being sufficiently advised in the premises, it is ordered that the said demurrer be, and the same is hereby, overruled. To which ruling of the court in overruling said demurrer the United States excepts and its exception is allowed. Whereupon the United States, by Elmer E. Todd, United States attorney, elects, in open court, to stand upon its said demurrer to said amended special plea of said defendant, Bob Celestine, and it is thereupon ordered that said amended special plea of said defendant to the jurisdiction is sustained. To which ruling of the court in sustaining said amended plea the United States excepts and its exception is allowed.

Entered in Vol. 1, page 203, U. S. Circuit Court journal.

26 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BOB CELESTINE, DEFENDANT. } No. 1684.

Judgment sustaining amended special plea to the jurisdiction.

This cause came on to be heard this 4th day of June, 1908, upon the demurrer of the plaintiff, the United States of America, to the

amended special plea of the defendant to the jurisdiction of this court, the defendant being personally in court, and after argument by counsel, the court being fully advised in the premises,

It is ordered, that said demurrer be and the same is hereby overruled, to all of which the said plaintiff, the United States of America, prays an exception, and said exception is hereby allowed.

And the plaintiff, the United States of America, at this time, in open court, having elected to stand upon its said demurrer to said amended special plea of the defendant,

It is ordered and adjudged, that said amended special plea of the defendant, Bob Celestine, to the jurisdiction of this court be and the same is hereby sustained, and that said cause be and the same is hereby dismissed, and

27 It is further ordered that said defendant be delivered up by the United States marshal for this district to the sheriff of Snohomish County, State of Washington, to be dealt with by the authorities of said Snohomish County, Washington, according to law.

To which judgment, and each and every part thereof, the plaintiff, the United States of America, prays an exception, and said exception is hereby allowed.

C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

(Indorsed:) Judgment sustaining amended special plea to the jurisdiction. Filed June 4, 1908. A. Reeves Ayres, clerk; by A. N. Moore, deputy.

28 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BOB CELESTINE, DEFENDANT. } No. 1684.

Petition for writ of error.

Now comes the United States of America, plaintiff herein, and says that on or about the 4th day of June, 1908, the Circuit Court, of the United States, for the Western District of Washington, entered a judgment herein sustaining the amended special plea of the defendant, Bob Celestine, pleaded herein to the jurisdiction of said court, in which judgment, and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, the United States of America, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff, the United States of America, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and

that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ELMER E. TODD,
United States Attorney.

(Indorsed:) Petition for writ of error. Filed June 4, 1908. A. Reeves Ayres, clerk: A. N. Moore, deputy.

29 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BOB CELESTINE, DEFENDANT. } No. 1684.

Assignment of Errors.

The plaintiff, the United States of America, in this cause in connection with its petition for a writ of error, makes the following assignments of error, which it avers exist:

I.

The court erred in overruling the demurrer of the plaintiff, the United States of America, to the amended special plea of the defendant to the jurisdiction of the court.

II.

The court erred in sustaining defendant's amended special plea to the jurisdiction of the court.

III.

The court erred in conceiving that it was without jurisdiction or power to entertain this cause.

IV.

The court erred in dismissing the action.

V.

30 The court erred in holding that section 9 of the act of March 3, 1885 (chapter 341, 23 Statutes at Large, page 385) did not give the court jurisdiction to try the defendant, Bob Celestine, for a murder alleged to have been committed upon the Tulalip Indian Reservation, for the reason that said defendant had received an allotment of lands upon said reservation under the patent which is set out in said amended special plea of the defendant to the jurisdiction of the court.

VI.

The court erred in holding that under section 6 of the act of February 8, 1887 (chapter 119, 24 Statutes at Large, page 388), as amended by the act of March 3, 1901 (chapter 868, 31 Statutes at Large, page 1447), that the defendant, Bob Celestine, was subject to the jurisdiction of the courts of the State of Washington alone for a murder committed upon the Tulalip Indian Reservation, since he, as an Indian, had received an allotment upon that reservation, under the patent which is set out in said amended special plea of the defendant to the jurisdiction of the court.

VII.

The court erred in entering an order delivering the defendant over to the authorities of Snohomish County, State of Washington.

Wherefore plaintiff prays that the said errors be corrected, and the judgment of the Circuit Court be reversed.

ELMER E. TODD,
United States Attorney.

(Indorsed:) Assignment of errors. Filed June 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

31 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BOB CELESTINE, DEFENDANT. } No. 1684.

Order allowing writ of error.

This 4th day of June, A. D. 1908, comes the plaintiff, the United States of America, by Elmer E. Todd, United States attorney for the Western District of Washington, and files herein, and presents to the court its petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Circuit Court of the United States for the Western District of Washington, and also an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration thereof the court does allow the writ of error without bond.

C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

(Indorsed:) Order allowing writ of error. Filed June 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

32 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. 1684.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Western District of Washington, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between the United States of America, plaintiff, and Bob Celestine, defendant, a manifest error has happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 3rd day of July next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said
33 Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States of America one hundred and thirty-two.

_____ _____,
Clerk of the Circuit Court of the United States for the Western District of Washington.

Allowed by

C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

(Indorsed:) Writ of error. Filed June 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

34 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. 1684.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Bob Celestine, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 3rd day of July next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Given under my hand at the city of Seattle, in the circuit and district above named this 4th day of June, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

35 Department of Justice, Office of United States Marshal, Western District of Washington.

Return on service of writ.

I hereby certify and return that I served the within writ by handing to and leaving a true and correct copy thereof with Bob Celestine personally and with his attorney, F. B. Weistling, personally, at Seattle, county of King, Western District of Washington, on the 4th day of June 1908.

Dated June 4, 1908.

C. B. HOPKINS, *U. S. Marshal.*
By FRED M. LATHE, *Deputy.*

Due service of the within citation this 4th day of June, 1908, by service of a duly certified copy of the same upon the defendant, and by receipt of a duly certified copy by me as his attorney, is hereby acknowledged.

F. B. WIESTLING,
Attorney for Bob Celestine.

(Indorsed:) Citation. Filed June 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

36 United States Circuit Court for the Western District of Washington.

UNITED STATES, PLAINTIFF,
vs.
BOB CELESTINE, DEFENDANT. } No. 1684. Praecipe.

To the clerk of the above entitled court:

You will issue two certified copies of the citation in the above entitled case.

ELMER E. TODD,
U. S. Attorney.

(Endorsed:) Praecipe for process, etc. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, dep.

37 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA
vs.
BOB CELESTINE. } No. 1684. Recognizance of defendant.

Now on this 4th day of June, 1908, comes the above named defendant, into open court, and acknowledges himself to owe the United States of America the sum of ten thousand ($10,000.00) dollars, lawful money of the United States, and for the payment thereof binds himself, his heirs, executors and administrators, and consents that the same be levied on his lands, goods, chattels, and effects. Conditioned that the said Bob Celestine, now before the court, who has been indicted in this court for the crime of murder, shall appear to answer said charge before this court when required pursuant to the mandate of the Supreme Court of the United States, to which said Supreme Court the said plaintiff has sued out a writ of error; and it is further conditioned that pending the appeal herein the said defendant shall not leave the jurisdiction of this court.

Entered in vol. 1, page 204, U. S. Circuit Court journal.

38 United States Circuit Court for the Western District of Washington.

UNITED STATES
vs.
BOB CELESTINE. } No. 1684. Praecipe.

To the clerk of the above entitled court:

You will please prepare transcript of record in above cause for Supreme Court in accordance with writ of error on file, said tran-

script to contain everything on file in cause and all docket entries, and forward the same to the Attorney-General, Washington, D. C.

ELMER E. TODD,
U. S. Atty.

(Endorsed:) Praecipe for process, etc. Filed in the U. S. Circuit Court, Western Dist. of Washington, Jun. 4, 1908. A. Reeves Ayres, clerk; A. N. Moore, dep.

39 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. 1684.

Clerk's certificate.

UNITED STATES OF AMERICA, *Western District of Washington, ss:*

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing forty-four (44) typewritten pages, numbered from 1 to 44, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as the same remain of record and on file in the office of the clerk of the said court, as I am required to certify and transmit as the record on appeal from the Circuit Court of the United States for the Western District of Washington, and as the return to the annexed writ of error, to the Supreme Court of the United States, Washington, D. C.; and that the foregoing record constitutes the record on appeal and return to said annexed writ of error.

I further certify that I annex hereto and herewith transmit the original citation and writ of error.

I further certify that the cost of preparing and certifying the foregoing record on appeal and return to writ of error is the sum of $25.60, and the same will be included in my quarterly account for fees against the United States for the quarter ending December 31, 1908.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Seattle, in said district, this 9th day of July, 1908.

[SEAL.]

A. REEVES AYRES, *Clerk.*
By R. M. HOPKINS,
Deputy Clerk.

40 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. 1684.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Bob Celestine, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 3rd day of July next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Given under my hand at the city of Seattle, in the circuit and district above named, this 4th day of June, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

41 Department of Justice, Office of United States Marshal, Western District of Washington.

Return on service of writ.

I hereby certify and return that I served the within writ by handing to and leaving a true and correct copy thereof with Bob Celestine personally, and with his attorney, F. B. Weistling, personally, at Seattle, county of King, Western District of Washington, on the 4th day of June, 1908.

Dated June 4, 1908.

C. B. HOPKINS, *U. S. Marshal,*
By FRED. M. LATHE, *Deputy.*

Due serivce of the within citation this 4th day of June, 1908, by service of a duly certified copy of the same upon the defendant, and by receipt of a duly certified copy by me as his attorney, is hereby acknowledged.

F. B. WIESTLING,
Attorney for Bob Celestine.

(Indorsed:) In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Bob Celestine, defendant in

error. Citation. Filed June 4, 1908. A. Reeves Ayres, clerk; by A. N. Moore, deputy.

42 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. —.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Western District of Washington, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between the United States of America, plaintiff, and Bob Celestine, defendant, a manifest error has happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 3d day of July next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said
43 Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States of America one hundred and thirty-two.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington.

Allowed by
C. H. HANFORD,
United States District Judge, holding the Circuit Court of the United States for the Western District of Washington.

44 (Indorsed:) In the Supreme Court of the United States. United States of America, plaintiff in error, vs. Bob Celestine, defendant in error. Writ of error. Filed June 4, 1908. A. Reeves Ayres, clerk, by A. N. Moore, deputy.

45 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
BOB CELESTINE, DEFENDANT IN ERROR. } No. 1684.

Order extending time to file record.

Now, on this 25th day of June, 1908, pursuant to rule nine of the rules of the Supreme Court of the United States, and for sufficient cause appearing, it is ordered that the time within which the clerk of this court shall prepare, transmit, and file with the clerk of the Supreme Court of the United States the transcript of the record and return to writ of error in this cause, be, and the same is hereby, extended to and including the 2d day of August, 1908.

C. H. HANFORD,
Judge United States District Court, Western District of Washington, Presiding in said Circuit Court.

46 (Indorsed:) No. 1684. In the Circuit Court of the United States for the Western District of Washington. United States vs. Bob Celestine. Order to extend time to file record. Filed in the U. S. Circuit Court, Western Dist. of Washington, June 25, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, deputy.

(Indorsement on cover:) File No. 21300. W. Washington, C. C., U. S. Term No., 504. The United States, plaintiff in error, vs. Bob Celestine. Filed August 11th, 1908. File No. 21300.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES
v.
BOB CELESTINE. } No. 235.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

The defendant, an Indian, was indicted May 22, 1908, in the United States Circuit Court for the Western District of Washington for the murder of Mary Chealco, an Indian woman, within the limits of the Tulalip Indian Reservation in that district.

The indictment was in two counts, the first of which reads in part as follows:

> That one Bob Celestine, an Indian, on the 30th day of August, in the year of our Lord 1906, within the limits of the Tulalip Indian Reservation, within the boundaries of the State of Washington, and within said Western District of Washington, Northern Division,

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did, with force and arms, make an assault upon one Mary Chealco, an Indian woman, with an axe, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, wilfully, knowingly, and with malice aforethought strike, beat, and mortally wound said Mary Chealco with said axe upon the head of the said Mary Chealco, with intent to kill and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said Tulalip Indian Reservation, in said Western District of Washington.

The second count is in similar terms, but charges in addition that the Tulalip Indian Reservation, where the offense was committed, is "a place under the exclusive jurisdiction of the United States."

By a special plea (Rec., p. 8) the defendant challenged the jurisdiction of the Circuit Court, alleging that at the time of the offense there had been allotted to him as the head of a family certain lands situate on the Tulalip Indian Reservation, within the limits of the State (then Territory) of Washington, under the provisions of the treaty of January 22, 1855 (12 Stat., 921), and in accordance with an executive order of December 23, 1873, and that a patent therefor was issued and delivered to him on May 19, 1885; that he was then a member of the Tulalip tribe of Indians; that ever since that date he "has been and still is a citizen of the United States, and

therefore ever since subject to the laws of the Territory and State of Washington;" that he "was born within the territorial limits of the United States and has always resided within such limits," and that, therefore, he was entitled to "all the rights, privileges and immunities of said citizens of the United States."

This plea also alleged that the murdered woman was a citizen of the United States and the widow of one Chealco Peter, who, like the defendant, had received an allotment of land within the Tulalip Reservation, and a patent therefor similar to Exhibit A, attached to the plea; that she became entitled to her husband's allotment upon his death, and that the place of the commission of the offense was upon the very land allotted to said Chealco Peter, and without the jurisdiction of the court.

A demurrer by the Government to the plea was overruled and judgment entered sustaining the plea. (Rec. p. 11.)

A writ of error to this court was then sued out by the United States (Rec. p. 12) under authority of the act of March 2, 1907 (34 Stat., 1246).

ASSIGNMENTS OF ERROR.

The following errors are assigned (Rec. p. 13):

I. The court erred in overruling the demurrer of the plaintiff, the United States of America, to the amended special plea of the defendant to the jurisdiction of the court.

II. The court erred in sustaining defendant's amended special plea to the jurisdiction of the court.

III. The court erred in conceiving that it was without jurisdiction or power to entertain this cause.

IV. The court erred in dismissing the action.

V. The court erred in holding that section 9 of the act of March 3, 1885 (ch. 341, 23 Stat. p. 385), did not give the court jurisdiction to try the defendant, Bob Celestine, for a murder alleged to have been committed upon the Tulalip Indian Reservation, for the reason that said defendant had received an allotment of lands upon said reservation under the patent, which is set out in said amended special plea of the defendant to the jurisdiction of the court.

VI. The court erred in holding that under section 6 of the act of February 8, 1887 (ch. 119, 24 Stat. p. 388), as amended by the act of March 3, 1901 (ch. 868, 31 Stat. p. 1447), that the defendant, Bob Celestine, was subject to the jurisdiction of the courts of the State of Washington alone for a murder com-

mitted upon the Tulalip Indian Reservation, since he, as an Indian, had received an allotment upon that reservation, under the patent which is set out in said amended special plea of the defendant to the jurisdiction of the court.

VII. The court erred in entering an order delivering the defendant over to the authoritites of Snohomish County, State of Washington.

Section 9 of the act of March 3, 1885 (23 Stat., 385), provides for the punishment of certain crimes by Indians within the limits of Indian reservations within state boundaries, as follows:

> That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, * * * and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

The general law prescribing punishment for the crime in places within the exclusive jurisdiction of the United States is found in section 5339 of the Revised Statutes, as amended by the act of January 15, 1897 (29 Stat., 487).

The treaty of January 22, 1855 (12 Stat., 927), with the Dwamish, Suquamish, and other tribes of Indians, known as the "Treaty of Point Elliott," provided in articles 2 and 3 thereof that certain lands should be reserved for the "use and occupation of the Indians," and, further (article 3): "That the President may establish the central agency, and general reservation at such other point as he may deem for the benefit of the Indians."

In pursuance of this authority, President Grant, on December 23, 1873 (Ex. Orders rel. Indian Reservations, p. 135), issued the following executive order:

> It is hereby ordered that the boundaries of the Snohomish or Tulalip Indian Reservation, in the Territory of Washington, provided for in the third article of the treaty with the Dwamish and other allied tribes of Indians, concluded at Point Elliott, January 22, 1855 (12 Stat., 928), shall be as follows, to wit: * * *

The lands described in this order include the tract subsequently allotted to Celestine as well as that upon which the crime was committed.

Article 7 of the treaty of Point Elliott contains the following provision:

> The President may hereafter, * * * at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing

> to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. * * *

The treaty with the Omahas referred to is that of March 16, 1854 (10 Stat., 1043), and article 6 provides that—

> The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home * * * And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened, or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution, embracing such lands within its boundaries, shall have been formed and the legislature of the State shall remove the restrictions. And if any such

> person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family their proportion of the annuities or other moneys due them until they shall have returned to such permanent home and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules, or regulations as may hereafter be prescribed by the Congress or President of the United States. No state legislature shall remove the restrictions herein provided for without the consent of Congress.

The patent issued to the defendant, attached to his special plea as an exhibit, refers to the treaty stipulations above mentioned, and contains the following granting provisions (Rec., p. 10):

> That the United States of America, in consideration of the premises, and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, anno Domini one thousand eight hundred and

> fifty-four, with the Omaha Indians, has given and granted and by these presents does give and grant unto the said Bob Celestine, as the head of the family aforesaid, and to his heirs the tract of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians that the said tract "shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, and forfeiture, which conditions shall remain in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions," and "no state legislature shall remove the restrictions"—"without the consent of Congress."
>
> To have and to hold the said tract of land with the appurtenances unto the said Bob Celestine, as the head of the family aforesaid, and to his heirs and assigns forever, with the stipulation aforesaid.

The act of February 22, 1889 (25 Stat., 676), providing for the admission of Washington, Montana, and other States, requires (sec. 4) that the constitutional conventions of the proposed States—

> shall provide, by ordinances irrevocable without the consent of the United States and the people of said States: * * *
>
> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said

> limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

The constitution of the State of Washington, Article XXVI, adopts, among others, the provision above quoted as an ordinance irrevocable without such joint consent. (2 Ballinger's Ann. Codes and Statutes, p. 2125.)

The General Allotment Act of February 8, 1887 (24 Stat., 388), passed after the issuance of the patent to Celestine, provides:

> SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have beem made shali have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart

from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

By act of May 8, 1906 (34 Stat., 182), this section is amended to read as follows:

SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privi-

leges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee-simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jusisdiction of the United States: * * *

Section 2 of the act of August 9, 1888 (25 Stat., 392), reads as follows:

> That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

ARGUMENT.

This case presents squarely for the first time in this court the question whether jurisdiction of the crime of murder committed by an Indian allottee upon allotted land of an Indian reservation in a State is vested in the State or in the Federal courts. A determination of this question is deemed important, because there should be no uncertainty concerning a matter so vital to the successful punishment of criminals.

The Tulalip Reservation was a legally constituted Indian reservation.

The provision of article 3 of the treaty of Point Elliott, above quoted, vests in the President authority to establish the reservation. Even had it been created by the executive order alone, any doubt as to its validity would be set at rest by the decision of this court in the case of *In re Wilson* (140 U. S., 575), where an Indian reservation had been created by an order of the President, and the court, referring to the first section of the general allotment act of 1887 (24 Stat., 388), said (p. 577):

> The necessary effect of this legislative recognition was to confirm the executive order, and establish beyond challenge the Indian title to this reservation.

SPOTS ON PA

Exclusive Federal jurisdiction over the reservation has not been expressly reserved otherwise than by the provisions of the enabling act above quoted. In *Draper* v. *United States* (164 U. S., 240), a case arising in Montana, it was held that such a provision was not a reservation of exclusive jurisdiction of crimes on an Indian reservation "by others than Indians or against Indians."

The United States has authority to define and punish crimes by or against Indians on reservation within the States.

In *United States* v. *Kagama* (118 U. S., 375), section 9 of the act of March 3, 1885, above quoted, was held to be valid and constitutional in all respects. That was an indictment against two Indians for the murder of another Indian on an Indian reservation in the State of California. So far as concerned the punishment of offenses committed upon reservations within the State, the jurisdiction of the United States was based upon the guardianship of the Federal Government over the Indians and the necessity of so protecting them.

In *Draper* v. *United States* (164 U. S., 240) where it was held that the General Government did not have jurisdiction to punish a negro for the murder of another negro upon an Indian reservation within a State, in the absence of any provision excluding State jurisdiction, the court said:

> It is clear that if the accused was an Indian the court below had jurisdiction under the act of March 3, 1885, which, among other

things, authorizes the punishment of any Indian committing the offense of murder within the boundaries of any State of the United States and within the limits of any Indian reservation, according to the laws and before the tribunals of the United States.

To the same effect are—

United States v. *Thomas* (151 U. S., 577).
John Bad Elk v. *United States* (177 U. S., 529).
United States v. *Bridleman* (7 Fed., 894).
United States v. *Martin* (14 Fed., 817).
United States v. *Barnhart* (22 Fed., 285).

The United States has not surrendered its criminal jurisdiction over the Tulalip Reservation.

The question, then, is whether Congress, in possession of exclusive jurisdiction to punish crimes by or against Indians on Indian reservations, and having expressly exercised its authority and prescribed punishment for such offenses, has surrendered that jurisdiction to the State in so far as the Tulalip Reservation is concerned.

It is not denied that the guardianship of the General Government over the Indians is such that Congress may discontinue the relation at will, and that if it clearly and unequivocally expresses an intent to abandon its guardianship the courts should not question such action or inquire whether the necessity for the protection of the Indians has ceased. (*Matter of Heff*, 197 U. S., 488, 489.)

What action has Congress taken to divest itself of jurisdiction over Indians on the Tulalip Reservation? Doubtless the provisions of section 6 of the General Allotment Act of 1887 will be relied upon as having that effect.

That section so far as applicable to the Indians on the Tulalip Reservation, including the defendant in this case, who received his allotment two years before the act was passed, is as follows:

> * * * every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

It will be observed that the first part of that section, which provides that "each and every Indian to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and

criminal, of the State and Territory in which they may reside," applies only to Indians allotted under the provisions of the act of 1887, and does not apply to the Indians allotted under other acts or treaties, such as those on the Tulalip Reservation.

The Government contends that Congress did not intend by this statute to subject Indians who had received allotments under the provisions of other acts or treaties to the civil and criminal jurisdiction of the States.

Exemption from Federal jurisdiction not to be presumed in absence of clear legislative provision.

In *Ruggles* v. *Illinois* (108 U. S., 526) the court, speaking by Chief Justice Waite, said (p. 531):

> Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in *Charles River Bridge* v. *Warren Bridge* (11 Pet., 420, 547): "It can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created." This is an elementary principle.

In the *Matter of Heff* (197 U. S., 488) the court, referring to the relations of guardian and ward between

the General Government and the Indians and the power of Congress to determine when and how that relationship shall cease, said (p. 499):

> It is true there may be a presumption that no radical departure is intended and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

The facts in the Heff case are very different from those of the present case. There the offense of selling liquor to the Indian allottee was committed off the reservation, and the allotment was made under the General Allotment Act. Therefore the allottee in that case came within the provisions of that part of section 6 of that act which subjects allottees thereunder to the laws, civil and criminal, of the State in which they may reside. The subjection of the allottee to the laws of the State might well be considered a sufficient indication of a purpose by Congress to surrender thereby its jurisdiction. In the present case, however, there is no such provision applicable to the allottee, and, moreover, the offense was committed upon an allotment within the reservation. This case, therefore, lacks that element which in the Heff case was declared essential to confer jurisdiction upon the State courts, to wit, a clear Federal legislative provision subjecting the Indian to State laws.

Congress did not intend to surrender criminal jurisdiction.

The intention of Congress, therefore, becomes controlling, and that it did not think citizenship alone sufficient to subject the allottee to State jurisdiction is apparent. Otherwise it would not have thought an express additional provision necessary to subject some of the allottees to such jurisdiction. Its omission at the same time to subject allottees under previous laws or treaties to State laws is significant. Had its intention been to subject all allotted Indians to such laws it could have done so much more easily by the use of general language. Having limited the application of the clause referred to to allottees under the act of 1887, and having thus confined its application in a section of the statute which also deals expressly with allottees under other laws and treaties, clearly its intention was that the latter should be excluded from subjection to State laws. To hold otherwise would be to hold that the clause referred to had no significance.

The act of May 8, 1906 (34 Stat., 182), extending to the expiration of the trust period the date when allottees under the act of 1887 shall be subject to state laws, and omitting any reference to allottees under other laws and treaties is significant. It indicates that Congress found it had been too hasty in placing the first-mentioned allottees under the jurisdiction of the State, and that it did not think any extension of time necessary as to allottees under other acts and treaties, because they had not been subjected to State laws.

Citizenship not inconsistent with continued Federal jurisdiction.

In *United States* v. *Logan* (105 Fed., 240), the defendant, an allottee under the act of 1887, had assaulted an Indian upon the Siletz Reservation in Oregon. District Judge Bellinger, in sustaining the Federal jurisdiction, said (p. 241):

> I am of the opinion, further, that the allotment of lands to the defendant does not take the case out of the jurisdiction of this court. The Indians affected by these allotments are still dependent communities. The lands allotted to them continue to be held by the United States, in trust for their benefit. The allottees are still subject to the regulations provided for the government of Indian reservations. Notwithstanding the mandate of the act of Congress declaring them citizens, they are still minors in the eyes of the law, incapable of disposing of the lands held by them, or even of leasing them without the consent of the reservation agent; and their dependence is still so complete that it is a crime to sell or give to them whisky or other intoxicants. The rights of the defendant as an allottee of land are not material. The question of jurisdiction is with reference to the place where the crime was committed, which must be "within the limits" of a reservation. Unless the allotment took this land out of the reservation limits, a thing beyond question and not contended for, the jurisdiction of the court is not affected by it.

In *United States* v. *Mullin* (71 Fed., 682), an indictment for resisting the service of a writ by an Indian policeman, District Judge Shiras said (p. 685):

> Much stress was laid in the argument upon the fact that under the acts of Congress providing for the allotment of lands in severalty the allottees become, and are declared to be, citizens of the United States; it being assumed that, so soon as the Indian becomes a citizen of the United States, the Government is relieved from all treaty obligations to him. The conclusion is not derivable from the premise. Certainly, the Government is as much obliged to its own citizens to perform its duties and obligations, as it is to those who are not citizens.

In *Rainbow* v. *Young* (161 Fed., 835), the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Van Devanter, said (p. 836):

> Of the questions discussed by counsel, we deem it necessary to here notice the single one of the commissioner's authority to give the direction which was disregarded by Mr. Sloan and in the orderly execution of which he was removed from the reservation. While the members of the Winnebago tribe have received allotments in severalty and have become citizens of the United States and of the State of Nebraska, their tribal relation has not been terminated. They are not permitted to alienate, mortgage, or lease their allotments without the sanction of the Secretary of the Interior. Their lease moneys are collected

> and disbursed by officers of the United States. Their lands and some at least of their other property are not taxable; and the United States maintains a reservation, an agency, and a training school for their benefit. In short, they are regarded as being in some respects still in a state of dependency and tutelage which entitles them to the care and protection of the National Government; and when they shall be let out of that state is for Congress alone to determine.

See also—

United States v. *Rickert* (188 U. S., 432).
McKay v. *Kalyton* (204 U. S., 458).
Beck v. *Real Estate Company* (65 Fed., 30).
Farrell v. *United States* (110 Fed., 942).
Coombs, Petitioner (127 Mass., 278).
State v. *Denoyer* (6 N. Dak., 586).

State v. *Columbia George* (39 Oreg., 127) was exactly like the present case. An allotted Indian woman had been murdered by Indian allottees upon allotted land within the Umatilla reservation in the State of Oregon. In holding that the State had no jurisdiction of the offense, the Supreme Court of Oregon said (p. 146):

> It would seem, therefore, that citizenship, such as extends within the purview of the Dawes Act to Indian allottees, is neither inconsistent nor incompatible with the status of a tribal Indian; that the Government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes, indulging them yet a little while, but

> with greatly restricted authority, in their primitive government; and until the General Government has taken its hands off and relinquished supervision over its Indians the State court can not assume jurisdiction touching the criminal acts of one against another. The condition may appear to be an anomalous one that a person may be admitted to citizenship under one government and yet be permitted to maintain allegiance to another, however primitive that other may be; but such seems to be the natural outgrowth of the anomalous attitude that the General Government has maintained towards the Indian from the beginning.
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> * * * * *
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> The State courts have never had jurisdiction over the Indians within the Indian country or upon Indian reservations, except as and in so far as the General Government has relinquished the supervisory control and authority over them. The acts under consideration are not indicative of such a purpose; hence it follows that the State court is without jurisdiction of the offense charged.

Columbia George was then tried and convicted in the Federal court. An application by him and Toy Toy, with whom he was jointly indicted, for leave to file a petition for the writ of habeas corpus, was denied by this court (201 U. S., 641). Thereafter, a petition by Toy Toy for a writ of habeas corpus upon the ground that, as he was a citizen, the Federal court was without jurisdiction, was denied by the

Circuit Court and its action affirmed by this court on appeal (212 U. S., 542).

In delivering the judgment of the court in that case, the Chief Justice refers to the opinion of the Supreme Court of Oregon in the case of Columbia George as "a careful opinion," and, in regard to the allegation in the petition of Toy Toy that he was an allottee and a citizen, says (p. 548):

> If such were the facts, and they made out a want of jurisdiction under the applicable statutes, *which on the merits we do not hold*, the Circuit Court, nevertheless, was authorized to hear and pass upon those questions in the first instance * * *.

To hold that the Federal courts are without jurisdiction of such offenses, after the State courts have declined to exercise jurisdiction, might give rise to a serious condition of affairs.

The rule contended for does not deprive the allottee of any of the rights or privileges of citizenship.

Trial by a State instead of a Federal court is not a right or privilege inhering in Federal or State citizenship. The Federal courts exercise jurisdiction of crimes by citizens when committed in places subject to exclusive federal jurisdiction. Moreover, the General Government, with power, as we have seen, to define crimes in Indian reservations which are either by or against Indians, must necessarily have authority to punish citizens when they commit therein a crime against an Indian.

Neither is citizenship inconsistent with the duty of the United States to protect and defend its wards, upon which the authority to punish crimes on reservations is based. Guardianship does not cease with citizenship. Many wards are citizens, and yet, because not competent to manage their own affairs, or some of them, receive the care and protection of guardians.

It is not contended that a limited citizenship is conferred upon allottees, but rather that citizenship is consistent with continued tribal existence and Indian character.

In *United States* v. *Real Estate Company* (69 Fed., 886, 891), the court said:

> It is to be expected that in the effort to advance the Indian from his semisavage condition, and to change his tribal character into individual citizenship, many anomalous situations will arise, which must be viewed in the light of all the legislation upon the same subject, including the treaties made with the several tribes.

The Indian is not the only one who, in our jurisprudence, may be regarded as occupying an exceptional position. Holding that the constitutional provision against involuntary servitude does not apply to the enforcement of the contracts of seamen, this court, in the case of *Robertson* v. *Baldwin* (165 U. S., 275, 282), said:

> To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its

> general language, and the further question is at once presented, Where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

In view of the anomalous and dependent condition of the Indian and the protection of his person and property from the foundation of the Federal Government, it would seem that conferring upon him the rights of citizenship should not alone be held sufficient to deprive it of all jurisdiction over him, especially upon a reservation set apart for the exclusive use and occupation of the tribe to which he belongs.

The offense in question was committed on an Indian reservation within the meaning of the act of March 3, 1885.

The special plea alleges that the offense charged was committed upon the lands allotted to Chealco Peter and his family.

It seems that at the time of the crime the Tulalip Reservation was occupied by 453 Indians, under the charge of an Indian agent. (Rep. Com. Ind. Affairs, 1906, pp. 377, 483.) Thirteen thousand five hundred and sixty acres have been allotted to 94 of these Indians, and the residue, 8,930 acres, remains unallotted. (Rep. Com. Ind Affairs, 1908, p. 162.)

The act of Congress of January 30, 1897 (29 Stat., 506), forbids the introduction of liquor into the Indian country, and says "which term shall include any

Indian allotment while the title to the same shall be held in trust by the Government or while the same shall remain inalienable by the allottee without the consent of the United States."

This indicates the intention of Congress that the prior status of allotted land should not be changed during the period of limitation.

In the case of *Couture* v. *United States* (207 U. S., 581) the indictment was for introducing liquor into the Indian country, namely, the Bad River Reservation, in the State of Wisconsin, and it appeared that the liquor had been actually carried upon land in the reservation which had been allotted in 1872. This court, without rendering an opinion, upheld the action of the trial court in holding the act of 1897 applicable. Since it was held in the Heff case that an emancipation from Federal control once created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and there had been no such consent, it follows that the decision in the Couture case must have proceeded upon the theory that allotted lands were Indian country within the meaning of that term as used in the act forbidding the introduction of liquor, without regard to the added clause declaring allotments Indian country. In other words, that clause being inserted after the allotment of the land in question would be an attempt to regain Federal control unless the allotments were Indian country before the clause was enacted, and, under the Heff

decision, there can be no resumption of Federal control once surrendered.

The same result would be reached by holding that the Indians on the Bad River Reservation, who had been allotted under the Chippewa treaty of September 30, 1854, had not been subjected to State jurisdiction, as contended for in this case.

In *Eels* v. *Ross* (64 Fed., 417) an injunction was sought restraining officers of the army from removing from Indian allotted land certain persons engaged in building a railroad. The injunction was denied. Mr. Justice McKenna (then Circuit Judge), delivering the opinion of the Circuit Court of Appeals, said (p. 419):

> If the land was an Indian reservation, the agents had a right to remove all persons found there contrary to law. (Rev. Stat., sec. 2147; see, also, Rev. Stat., secs. 2118, 2149.) It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians, 5 Wall., 737), and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. Some of the restraints of a reservation may be inconsistent with the

> rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations. Section 3 provides for leasing lands under certain contingencies, under the regulations of the Secretary of the Interior, and the proviso of the section contemplates agents in charge of the reservations. Besides, the practice of the Department has been and is to maintain them, and this practice is respectable evidence of a correct interpretation of the statute by officers who may have suggested the policy and written the provisions of the statute. (*Railroad Co.* v. *Whitney*, 132 U. S., 357, 366; *Sturr* v. *Beck*, 133 U. S., 548.) That the abolition of reservations and of the guardianship of the Indians is the ultimate hope of the policy, there can be no doubt; but it will not be soonest realized by attributing fanciful qualities to the Indians, or by supposing that their natures can be changed by legislative enactment.

District Judge Shiras, dealing with a question as to the validity of leases of allotted land, in the case of *United States* v. *Flournoy Live Stock and Real Estate Company* (71 Fed., 576, 579) said:

> I further hold that these reservations continue to be Indian reservations; that the United States has never yet been released from the treaty stipulations and obligations by which it assumed to preserve these lands for the

> use and benefit of the Indians; that the United States holds the title of these lands charged with the trust created by the treaties in question, and it is its duty to do whatever is necessary to protect the Indians in the proper use and occupancy thereof; that the power and right in the United States to do whatever is necessary for the fulfillment of its treaty duties, trusts, and obligations toward the Indians rests upon every foot of soil and upon every individual within the boundaries of the reservations, and this power and right is paramount and supreme.

See also *United States* v. *Mullin* and *Rainbow* v. *Young*, above quoted.

The conclusion that allotted land is not thereby excepted from a reservation and is still Indian country within the intention of Congress, seems to be the only reasonable and proper one. Otherwise Federal statutes relating to reservations and the Indian country and punishing crimes therein (Rev. Stat., secs. 2127 to 2157), would cease to apply, and thus Congress, charged with the duty to protect the Indians, would be held to have abandoned that duty entirely, when in fact it only extended to them the privileges of citizenship.

As already suggested, the question whether certain crimes should be punished in one jurisdiction or another is grave and important for the protection of society by preventing the escape of the guilty. That jurisdiction should be so clearly defined that officials may immediately know where it rests. The rule that all crimes by or against

Indians on Indian reservations are the subject of Federal cognizance is easily understood and readily applied. The boundaries of Indian reservations are locally well known and the distinguishing racial characteristics of the Indian are sufficient to enable persons of ordinary observation readily to identify them. If it should be held necessary, however, for the officers to go further, and to inquire whether one or both of the principals in the crime had received allotments, what were the provisions of their allotment patents, whether their title was held in trust for them by the Government or patented in fee with restrictions against alienation, under what act of Congress the patent was issued and what were the provisions of that act, and whether there had been by treaty or act of admission any reservation of exclusive jurisdiction over the reservation land, then, it is submitted, failures of justice would be frequent and lawlessness would be encouraged in regions and among people where a rigid enforcement of the law is needed.

That such a complicated situation could not by any possibility have been in the mind of Congress when it said simply that an allotted Indian should be a citizen seems beyond question. That such an intention should not be imputed to Congress in the absence of explicit language to that effect is equally clear.

It is respectfully submitted that the judgment of the Circuit Court should be reversed.

WILLIAM R. HARR,
Assistant Attorney-General.

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UNITED STATES *v.* CELESTINE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 235. Argued October 14, 1909.—Decided December 13, 1909.

Although an Indian may be made a citizen of the United States and of the State in which the reservation for his tribe is located, the United States may still retain jurisdiction over him for offenses committed within the limits of the reservation; and so held as to a crime committed by an Indian against another Indian on the Tulalip Indian Reservation in Washington, notwithstanding the Indians had received allotments under the treaties with the Omahas of March 16, 1834, and of Point Elliott of January 22, 1835. *Mat-*

ter of Heff, 197 U. S. 488, distinguished, the Indian in that case being an allottee under the general allotment act of February 8, 1887, c. 119, 24 Stat. 388.

Legislation of Congress is to be construed in the interest of the Indians; and, in the absence of a subjection in terms of the individual Indian to state laws and denial of further jurisdiction over him by the United States, a statute will not be construed as a renunciation of jurisdiction by the United States of crimes committed by Indians against Indians on Indian reservations.

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending the trust period of allottees under the act of 1887, suggests that Congress believed it had been hasty in its prior action in granting citizenship to Indians.

At the May term, 1908, of the Circuit Court of the United States for the Western District of Washington an indictment was found against the defendant, the first count of which reads:

"That one Bob Celestine, an Indian, on the thirtieth day of August, in the year of our Lord 1906, within the limits of the Tulalip Indian Reservation, within the boundaries of the State of Washington, and within said Western District of Washington, Northern Division, did, with force and arms, make an assault upon one Mary Chealco, an Indian woman, with an axe, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, willfully, knowingly, and with malice aforethought strike, beat, and mortally wound said Mary Chealco with said axe upon the head of the said Mary Chealco, with intent to kill and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said Tulalip Indian Reservation, in said Western District of Washington."

The second count is in similar terms, but charges in addition that the Tulalip Indian Reservation, where the offense was committed, is "a place under the exclusive jurisdiction of the United States."

By a special plea the defendant challenged the jurisdiction of the Circuit Court, alleging that at the time of the offense there had been allotted to him as the head of a family certain lands situate on the Tulalip Indian Reservation, within the limits of the State (then Territory) of Washington, under the provisions of the treaty of January 22, 1855, (12 Stat. 927), and in accordance with an executive order of December 23, 1873, and that a patent therefor was issued and delivered to him on May 19, 1885; that he was then a member of the Tulalip tribe of Indians; that ever since that date he "has been and still is a citizen of the United States, and therefore subject to the laws of the Territory and State of Washington;" that he "was born within the territorial limits of the United States and has always resided within such limits," and that, therefore, he was entitled to "all the rights, privileges and immunities of said citizens of the United States."

This plea also alleged that the murdered woman was a citizen of the United States and the widow of one Chealco Peter, who, like the defendant, had received an allotment of land within the Tulalip Reservation, and a patent thereof similar to that of defendant; that she became entitled to her husband's allotment upon his death, and that the place of the commission of the offense was upon the very land allotted to said Chealco Peter, and without the jurisdiction of the court.

A demurrer by the Government to the plea was overruled and judgment entered sustaining the plea.

A writ of error to this court was then sued out by the United States under authority of the act of March 2, 1907, c. 2564, 34 Stat. 1246.

Mr. Assistant Attorney General Harr for the United States:

This case presents squarely for the first time in this court the question whether jurisdiction of the crime of murder committed by an Indian allottee upon allotted land of an

Indian reservation in a State is vested in the state or in the Federal courts. A determination of this question is deemed important, because there should be no uncertainty concerning a matter so vital to the successful punishment of criminals. The Tulalip Reservation was a legally constituted Indian reservation. *Re Wilson*, 140 U. S. 575; *Draper* v. *United States*, 164 U. S. 240.

The United States has authority to define and punish crimes by or against Indians on reservations within the States. *United States* v. *Kagama*, 118 U. S. 375; *Draper* v. *United States*, 164 U. S. 240; *United States* v. *Thomas*, 151 U. S. 577; *Elk* v. *United States*, 177 U. S. 529; *United States* v. *Bridleman*, 7 Fed. Rep. 894; *United States* v. *Martin*, 14 Fed. Rep. 817; *United States* v. *Barnhart*, 22 Fed. Rep. 285.

The United States has not surrendered its criminal jurisdiction over the Tulalip Reservation. *Matter of Heff*, 197 U. S. 488, distinguished.

Exemption from Federal jurisdiction is not to be presumed in absence of clear legislative provision. *Rugles* v. *Illinois*, 108 U. S. 526, 531.

This case lacks the element which in the *Heff case* was declared essential to confer jurisdiction upon the state courts, to wit, a clear Federal legislative provision subjecting the Indians to state laws.

The act of May 8, 1906, 34 Stat. 182, extending to the expiration of the trust period the date when allottees under the act of 1887 shall be subject to the state laws, and omitting any references to allottees under other laws and treaties is significant. It indicates that Congress found it had been too hasty in placing the first-mentioned allottees under the jurisdiction of the State, and that it did not think any extension of time necessary as to allottees under other acts and treaties, because they had not been subjected to state laws.

Citizenship is not inconsistent with continued Federal jurisdiction. *United States* v. *Logan*, 105 Fed. Rep. 240; *United*

States v. *Mullin*, 71 Fed. Rep. 682; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *United States* v. *Rickert*, 188 U. S. 432; *McKay* v. *Kalyton*, 204 U. S. 458; *Beck* v. *Real Estate Co.*, 65 Fed. Rep. 30; *Farrell* v. *United States*, 110 Fed. Rep. 942; *Coombs, Petitioner*, 127 Massachusetts, 278; *State* v. *Denoyer*, 6 N. Dak. 586.

State v. *Columbia George*, 39 Oregon, 127, governs this case. Columbia George was tried and convicted in the Federal court. An application by him and Toy Toy, with whom he was jointly indicted, for leave to file a petition for the writ of *habeas corpus*, was denied by this court, 201 U. S. 641. Thereafter a petition by Toy Toy for a writ of *habeas corpus* upon the ground that, as he was a citizen, the Federal court was without jurisdiction, was denied by the Circuit Court and its action affirmed by this court on appeal, 212 U. S. 542.

To hold that the Federal courts are without jurisdiction of such offenses, after the state courts have declined to exercise jurisdiction, might give rise to a serious condition of affairs.

The rule contended for does not deprive the allottee of any of the rights or privileges of citizenship. It is not contended that a limited citizenship is conferred upon allottees, but rather that citizenship is consistent with tribal existence and Indian character. *United States* v. *Real Estate Co.*, 69 Fed. Rep. 886, 891.

The offense in question was committed on an Indian reservation within the meaning of the act of March 3, 1885. *Couture* v. *United States*, 207 U. S. 581; *Eells* v. *Ross*, 64 Fed. Rep. 417, and see *United States* v. *Flournoy Co.*, 71 Fed. Rep. 576; *United States* v. *Mullin*, and *Rainbow* v. *Young*, *supra*. The conclusion that allotted land is not thereby excepted from a reservation and is still Indian country within the intention of Congress, seems to be the only reasonable and proper one. Otherwise Federal statutes relating to reservations and the Indian country and punishing crimes therein

(Rev. Stat., §§ 2127–2157), would cease to apply, and thus Congress, charged with the duty to protect the Indians, would be held to have abandoned that duty entirely, when in fact it only extended to them the privileges of citizenship.

There was no appearance or brief for the defendant in error.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The fourth paragraph of the act of March 2, 1907, *supra*, authorizes a review of a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The defendant in this case had not been put upon trial, therefore he had not been in jeopardy. The decision of the Circuit Court sustained the special plea in bar. This fourth paragraph differs from the two preceding, in that the review authorized by them is limited to cases in which "the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded," while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to this court a right to review the precise question decided by a trial court in sustaining a special plea in bar although that decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded.

The general provision of the statutes in reference to punishment of the crime of murder committed within the exclusive jurisdiction of the United States is found in chap. 3, Title 70, Rev. Stat., §§ 5339–5391, as amended by the act of January 15, 1897, c. 29, 29 Stat. 487.

Section 9 of the act of March 3, 1885, c. 341, 23 Stat. 385, provides for the punishment of certain crimes by Indians, as follows:

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, . . . and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

By this section Indians committing against other Indians on a reservation in a State any of the crimes named are subject to Federal laws and tried in Federal courts.

That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

By the second clause of § 3, Art. IV, of the Constitution, to Congress, and to it alone, is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." From an early time in the history of the Government it has exercised this power, and has also been legislating concerning Indians occupying such territory. Without noticing prior acts, it is sufficient to refer to that of June 30, 1834, c. CLXI, 4 Stat. 729, the first section of which reads:

"*Be it enacted*, That all that part of the United States west of the Mississippi, and not within the States of Missouri and

Louisiana, or the Territory of Arkansas, and, also that part of the United States east of the Mississippi river, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

Construing this section, it was decided, in *Bates* v. *Clark*, 95 U. S. 204, 209, that all the country described in the act as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." The section was repealed by Rev. Stat., § 5596. Still, it was held that it might be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which were reënactments of other sections of prior legislation. *Ex parte Crow Dog*, 109 U. S. 556; *United States* v. *Le Bris*, 121 U. S. 278. But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress. By the treaty of January 22, 1855 (12 Stat. 927), known as the treaty of Point Elliott, it was provided that certain lands should be reserved for the "use and occupation of the Indians." And, further, article 3, "that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians." On December 23, 1873, the President established the boundaries of the Tulalip Reservation in the Territory of Washington. The tract sub-

sequently allotted to defendant, as well as that upon which the crime was committed, are within the boundaries prescribed in this executive order. Article 7 of the treaty of Point Elliott authorizes the President to set apart separate tracts within the reservation to such individuals or families as were willing to avail themselves of the privilege and locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. The treaty with the Omahas, March 16, 1854, (10 Stat. 1043,) provides for the location by an individual or family on land within the Omaha Reservation, its assignment for a permanent home, for the issue of a patent to such person or family, with conditions against alienation or leasing, exemption from levy, sale or forfeiture, not to be disturbed by the State without the consent of Congress; and, further, that if the (p. 1045) "person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment; . . . and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land." The patent issued to the defendant recites that it is issued under the provisions of the article referred to in the treaty with the Omaha Indians.

The plea does not challenge the continued tribal organization of the Tulalip Indians, or question that the tribe, as well as the general body of the reservation, continues under the general care of the United States. Indeed, at the time of the crime the Tulalip Reservation was occupied by 453 Indians, under the charge of an Indian agent. Rep. Com. Ind. Affairs, 1906, pp. 377, 483. Thirteen thousand five hundred and sixty acres have been allotted to 94 of these Indians, and the residue, 8,930 acres, remains unallotted.

Rep. Com. Ind. Affairs, 1908, p. 162. The fact of the patent to Chealco Peter is all that is claimed shows a want of jurisdiction of the United States over the place of the offense, but the conditions of the treaty with the Omahas, made by reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, make it clear that the special jurisdiction of the United States has not been taken away.

Eells et al. v. *Ross* (12 C. C. A. 205, Circuit Court of Appeals of the United States for the Ninth Circuit) presented the question of the revocation of a reservation. The treaty with the Puyallup Indians contains like provisions in regard to alienation and forfeiture as are in the treaty with the Omahas.

Circuit Judge McKenna, now Mr. Justice McKenna of this court, in delivering the unanimous opinion of that court, said (p. 207):

"It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect, (*The Kansas Indians*, 5 Wall. 737) and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so.

"Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly does not emancipate the Indians from all control, or abolish the reservations."

Dick v. *United States*, 208 U. S. 340, does not conflict with

these views, for there the place of the offense was the village of Culdesac, which, although within the boundaries of the Nez Perce Reservation, as at first established, was located upon lands passed by patent from the United States under the townsite laws to the probate judge of Nez Perce County, and by the townsite act such location could only be on public lands. Rev. Stat., § 2380.

But it is contended that although the crime may have been committed on an Indian reservation, yet it does not come within the last sentence of § 9 of the act of March 3, 1885, *supra*, by reason of the fact that both defendant and the woman murdered held patents from the United States, and *Matter of Heff*, 197 U. S. 488, is cited as authority. But there are these important differences between the two cases. In that the person to whom the defendant sold liquor (the charge being that of selling liquor to an Indian) had received a patent under the provisions of the act of Congress of February 8, 1887, known as the General Allotment Act (c. 119, 24 Stat. 388), whereas the patents in this case were issued under the authority of the treaty with the Omahas, March 16, 1854, *supra*, and the treaty of Point Elliott, January 22, 1855, *supra*. It also appeared that the sale was made, not on any reservation, while here the murder was committed within the limits of one.

Section 5 of the act of February 8, 1887, provides (24 Stat. 389) "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor," etc. Section 6 is as follows (24 Stat. 390):

"SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its

jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be seen that the first sentence of the latter section, which provides that the allottees shall be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizenship.

We assume, without deciding, that although Celestine was born within the territorial limits of the United States he was not, under the first section of the Fourteenth Amendment, a citizen of the United States prior to the issue of the patent to him; that the jurisdiction of the United States was over the tribe of which he was a member, and not over him personally; so that by the act of 1887 he was given a citizenship in the United States and in the State which did not theretofore belong to him. But, although made a citizen of the

United States and of the State, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation. We had occasion in the *Matter of Heff*, *supra*, to notice the fact that the first dealings with Indians were with them as tribes, but that of late there had been a change in the policy and a disposition to put an end to tribal organization and give to them as individuals all the rights of citizenship, saying (197 U. S. 499):

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended

by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States.

The act of May 8, 1906, c. 2348, 34 Stat. 182, extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty. See, upon the general questions discussed, *United States* v. *Mullin*, 71 Fed. Rep. 682; *Rainbow* v. *Young*, 161 Fed. Rep. 835; *State* v. *Columbia George*, 39 Oregon, 127; *State* v. *Columbia George*, 201 U. S. 641; *Couture* v. *United States*, 207 U. S. 581; *Toy Toy* v. *Hopkins*, 212 U. S. 542.

The judgment is

Reversed.